



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 98 222 50655 Office: Vermont Service Center

Date: AUG 10 2000

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

Public Copy
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

John F. O'Reilly
Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a hair salon which seeks to employ the beneficiary permanently in the United States as a hair stylist. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of December 11, 1997, the filing date of the visa petition.

On appeal, counsel provides a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience); not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is December 11, 1997. The beneficiary's salary as stated on the labor certification is \$13 per hour or \$27,040 annually.

The petitioner initially submitted a copy of its 1997 Form 1120S U.S. Income Tax Return for an S Corporation and a letter from one

of its owners, [REDACTED] The federal tax return reflected gross receipts of \$402,820; gross profit of \$320,756; compensation of officers of \$49,500; salaries and wages of \$110,715; depreciation of \$5,176; and ordinary income of \$10,780. Schedule L reflected total current assets of \$7,548 of which \$4,798 was in cash and total current liabilities of \$0.

The director concluded that the documents submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On August 12, 1998, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of December 11, 1997.

In response, counsel for the petitioner submitted a letter from the petitioner's accountant, another copy of the previously submitted 1997 federal tax return, a letter from the petitioner's bank stating that its balance was \$21,796.15 as of November 21, 1997, bank statements for the petitioner for the year 1997, and a lease dated November 10, 1993 signed by [REDACTED]

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, [REDACTED] claims to have reviewed the company's 1997 federal income tax return and to have interviewed the company's accountant regarding the company's business operations and financial condition, as well as the owners' financial condition.

Counsel states:

As a result of my investigation, I believe it is clear that [REDACTED] had the ability to pay an additional annual salary of \$27,040 as of September 29, 1997. . . .

[REDACTED] expects [REDACTED] to generate between \$5,000 and \$6,667 in cash flow on a monthly basis. Of this amount, [REDACTED] will receive \$2,253 in wages. As a result, [REDACTED] expects Mr. Demir to not only cover his own salary, but to also generate between \$2,747 and \$4,414 of monthly gross profit.

Based upon my analysis of [REDACTED] financial situation, the following financial resources were available to enable the Company to pay [REDACTED] an annual salary of \$27,040 as of September 29, 1997.

1997 Corporate Net Income	\$10,780
Cash on Hand	\$11,087
Non-Recurring Cash Expenses	\$17,700
██████████ Personal Assets	\$40,000
	<u>\$79,567</u>

A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Although counsel states that the salary paid as compensation to officers was discretionary, this expenditure was already expended and those funds were not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Furthermore, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

A review of the 1997 federal tax return shows that when one adds the depreciation, the ordinary income, and the cash on hand at year end (to the extent that current assets exceed current liabilities), the result is \$20,754 or \$6,286 less than the proffered wage. Since the petitioner filed a similar petition for another alien offering the same wage, the petitioner has \$33,326.00 less than the amount required to pay the wages offered to both aliens.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.